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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Docket No. 42104

ENTERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC.  
v.  
UNION PACIFIC RAILROAD COMPANY  
AND  
MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

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**ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S  
MOTION FOR LEAVE TO FILE SUPPLEMENT IN SUPPORT OF ITS  
PETITION FOR RECONSIDERATION  
BASED ON NEWLY-DISCOVERED EVIDENCE**

Michael A. Nelson  
101 Main Street  
Dalton, MA 01226  
(413) 684-2044

Transportation Consultant

Eric Von Salzen  
McLeod, Watkinson & Miller  
One Massachusetts Avenue, N.W.  
Suite 800  
Washington, DC 20001  
(202) 842-2345

Counsel for Arkansas Electric Cooperative  
Corporation

Dated: June 29, 2011

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BASED ON NEWLY-DISCOVERED EVIDENCE

Arkansas Electric Cooperative Corporation (AECC) <sup>1/</sup> respectfully moves for leave to supplement its Petition For Reconsideration (filed April 4, 2011), because information recently disclosed by UP in a filing in another STB docket shows that the Board was misinformed when it concluded that the severe disruptions in UP's service to the Entergy/AECC Independence plant in 2005 and 2006 "affected the shipping public generally" and therefore "do not establish a showing of anticompetitive conduct on UP's part with respect to [Independence]." Entergy Arkansas, Inc. & Entergy Services, Inc. v. Union Pacific RR, Missouri & Northern Arkansas RR, & BNSF Rwy., STB Docket No. 42104, served March 15, 2011 ("March 2011 Decision"), at 11.

In fact, UP recently disclosed in Ex Parte 705 that during the 2005-06 period, while it was failing to deliver million tons of coal that it had contracted to deliver to

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<sup>1/</sup> AECC uses the same conventional abbreviations for railroads, companies, and locations as it used in its Opening and Rebuttal Arguments and Petition For Reconsideration.

Independence, it was increasing its total deliveries of PRB coal by 19 million tons. Because Independence did not have the option of receiving coal via a competitive (i.e., BNSF) route, UP was able to marginalize shipments to Independence, which moved at an extraordinarily low rate, in order to increase more lucrative shipments to other customers pursuant to an explicit UP initiative to increase rates on its PRB coal traffic.

### Discussion

In its March 2011 Decision, the Board concluded that AECC and Entergy had failed to satisfy the requirements of the Board's competitive access rules, because they did not prove "that the past [UP] service problems involving the southern PRB were the result of competitive abuse." March 2011 Decision, at 8. Rather, the Board said, these service problems "affected the shipping public generally". *Id.*, at 11. In its Petition For Reconsideration, AECC called the Board's attention to evidence that, as a UP-captive customer unable to use BNSF service, Independence suffered a more protracted service disruption and was denied service options that could have resulted in recovery from the service disruptions sooner. AECC Petition For Reconsideration, at 11. UP responded that AECC's argument was "pure nonsense" and asserted that "UP customers, regardless of whether they were solely served by UP, were affected by service disruptions during the period at issue." UP Reply to AECC Petition For Reconsideration, at 10

Now, however, UP has filed evidence in Ex Parte No 705, Competition in the Railroad Industry, showing that during the service disruption that began in 2005 UP actually increased its shipments of southern PRB coal to other customers, while the Independence plant suffered a huge shortfall.

Data presented by UP in that docket show that UP increased the southern PRB Joint Line tonnage it handled in 2005 over 2004 and in 2006 over 2005. In 2005 and 2006 combined, UP handled a cumulative total of 19 million southern PRB tons above its 2004 baseline movement of 177 million tons per year. <sup>2/</sup> Given the Entergy shortfall of over 3 million tons (March 2011 Decision, at 8), it can be seen that in 2005 and 2006 UP moved enough southern PRB coal to cover 100 percent of the 2004 baseline volumes of all of its existing customers other than Entergy/AECC, plus over 22 million tons of new business, while it let Independence experience the costly consequences of a major delivery shortfall. UP's data thus demonstrate plainly that there was no widespread inability on its part to deliver established volume levels to existing customers. While other shippers may well have experienced delivery irregularities during this time, the Board was misled in thinking that the scope of the service failure experienced by Independence "affected the shipping public generally". March 2011 Decision, at 11.

Furthermore, the same data also show that BNSF had the capability to handle additional tonnage in 2005-06. In 2005 and 2006, BNSF handled a cumulative total of 17 million southern PRB tons above its 2004 baseline movement of 145 million tons per year. Thus, BNSF was also capable of handling substantial volumes of new business during the time of the shortfall at Independence. This shows that the Board was misled when it stated that, because "BNSF – the alternative carrier" was also affected by the 2005 service disruption, "the lack of

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<sup>2/</sup> See "Reply Comments of Union Pacific Railroad Company" (May 27, 2011), Reply Verified Statement of John J. Koraleski ("RVS Koraleski") at 17, Figure 2.

alternative routing neither caused nor exacerbated [Independence's] injuries". March 2011 Decision, at 9. In fact, if Independence had had the benefit of alternative rail service from BNSF in 2005-06, BNSF had the capacity to mitigate the tonnage shortfall imposed by UP.

And, of course, if BNSF service had been available, that would have provided the needed incentive for UP to carry the coal it had undertaken to carry, rather than risk the loss of that and future business to BNSF.

This new evidence thus refutes UP's claim in this case, which the Board credited, that there was a widespread capacity shortfall in 2005 and 2006 which broadly affected all southern PRB coal shippers, and that Independence was not singled out for poor service. Rather, the new evidence shows that UP and BNSF each had the capability to deliver more than the volume it had delivered in 2004, and that the shortfall at Independence was not part of an overall pattern of substantial delivery shortfalls that was shared widely by other coal shippers, but instead was unique and pronounced in its magnitude and duration. The new evidence also demonstrates that the availability of a BNSF option for Independence could have prevented the shortfall that Independence suffered.

Evidence provided by UP in Ex Parte No. 705 also clarifies the circumstances that caused UP to exercise its market power to the particular and unique detriment of Independence: In 2004, UP changed its pricing strategy on southern PRB coal, so that new business was priced at levels much higher than rates in "legacy" contracts, and fuel surcharge terms were added. RVS Koraleski, at 16-20. As the Board observed in the March 2011 Decision (at 15), the UP rates applicable to the Independence movement reflect an R/VC ratio of less than 125 percent. While the Board acknowledges (March 2011 Decision, at 15) that this low

rate in part reflected the settlement of past litigation – which left it even lower than the “legacy” rates UP sought to eliminate – the Board was not aware of the now-obvious causal linkage between this unusually low rate and UP’s decision to exercise its market power to the unique detriment of Independence. When UP changed its pricing strategy, and found it could book substantial volumes of new business at much higher rates than the low rate being paid by Entergy/AECC for the Independence movement, this created an incentive for UP to let Independence and its cheap rate twist in the wind, freeing up the capacity to move millions of tons of new business at much higher rates. In the absence of a competitive alternative for service to Independence, there was nothing to stop UP from exercising its market power in this manner when it so chose.

The newly discovered evidence filed by UP in Ex Parte 705 thus clearly shows that the service disruption that Independence suffered in 2005 and 2006 was the result of competitive abuse – even under the restrictive definition of that term the Board used in this case.

### **Conclusion**

For the reasons given in AECC’s Petition For Reconsideration, as supplemented by the newly-discovered evidence discussed in this Motion, the Board should reconsider its March 2011 Decision and grant the relief requested by AECC and Entergy.

Respectfully submitted,



Michael A. Nelson  
101 Main Street  
Dalton, MA 01226  
413-684-2044  
  
Transportation Consultant

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Eric Von Salzen  
McLeod, Watkinson & Miller  
Suite 800  
One Massachusetts Ave., NW  
Washington, DC 20004-1109  
(202) 842-2345

Counsel for Arkansas Electric Cooperative  
Corporation

Dated: June 29, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served electronically, on this 29th day of June 2011, on all persons on the Board's service list in Docket 42104.

A handwritten signature in black ink, consisting of several fluid, connected strokes. The signature appears to be 'Eric Von Salzen'.

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Eric Von Salzen